U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20536

U.S. Citizenship and Immigration Services

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[redacted]

APR 05 2004

FILE: [redacted] Office: DENVER, CO Date:

IN RE: [redacted]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under Section 212(h) of the Immigration and Nationality Act, 8 U.S.C. § 1182(h)

ON BEHALF OF APPLICANT:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Interim District Director, Services, Denver, Colorado, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Mexico who was found to be inadmissible to the United States under section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having been convicted of a crime involving moral turpitude. The applicant is the spouse of a United States citizen and seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), so that he may reside in the United States with his U.S. citizen wife.

The interim district director concluded that the applicant had failed to establish that extreme hardship would be imposed on a qualifying relative and denied the Application for Waiver of Grounds of Excludability (Form I-601) accordingly. *See* Decision of the Interim District Director, dated April 7, 2003.

On appeal, counsel asserts that the Immigration and Naturalization Service [now Citizenship and Immigration Services (CIS)] committed legal error by determining that third degree assault as defined by the Colorado statutes is a crime involving moral turpitude. Counsel further contends that CIS did not follow precedent in defining extreme hardship and did not balance the equities to reach a decision as required by case law. *See* Form I-290B, dated May 6, 2003.

In support of these assertions, counsel submits a brief; a declaration of the applicant, dated December 1, 2002 and copies of court documents pertaining to the applicant's criminal history. The entire record was considered in rendering a decision on the appeal.

The record reflects that on January 27, 1988, the applicant was convicted of assault in the third degree. The applicant was sentenced to a prison term of two years with all but 40 days suspended. Further, the applicant was fined and a mental evaluation was ordered.

Also in 1988, the applicant was convicted of Driving While Ability Impaired, a crime for which he was sentenced to two years of probation and five days in jail. On August 15, 1988, the applicant was convicted of Harassment and Disorderly Conduct. The applicant was sentenced to six months probation on the harassment charge.

Section 212(a)(2)(A) of the Act states in pertinent part:

> (i) [A]ny alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of-
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> > (I) a crime involving moral turpitude . . . or an attempt or conspiracy to commit such a crime . . . is inadmissible.

Section 212(h) of the Act provides, in pertinent part:

> (h) The Attorney General [Secretary of Homeland Security] may, in his discretion, waive the application of subparagraph (A)(i)(I) . . . of subsection (a)(2) . . . if -
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> . . . .

> (1)(B) in the case of an immigrant who is the spouse, parent, son, or daughter of a citizen of the United States or an alien lawfully admitted for permanent residence if it is established to the satisfaction of the Attorney General [Secretary] that the alien's denial of admission would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, son, or daughter of such alien . . .

Counsel asserts that the applicant's conviction for assault in the third degree does not constitute a crime involving moral turpitude (CIMT). *See* Appeal from Denial of I-601 Application. Counsel contends that Simple Assault is not a CIMT and therefore, Assault in the Third Degree as defined by Colorado statute is not a crime because it does not require an evil intent or depraved motive. *Id.* at 3 (quoting 9 FAM § 40.21(a) N.2.3-3(b)(1)). Further, counsel states, "If a statute includes some acts that do involve moral turpitude and some that don't, then a finding of inadmissibility cannot be sustained for violating the statute." *Id.* The AAO finds counsel's last assertion unpersuasive. If a statute includes both a CIMT as well as crimes not involving moral turpitude and the portion of the statute under which the applicant was convicted parallels simple assault, as suggested by counsel, then the applicant may be found not to have committed a CIMT. However, if the applicant's conduct falls within the portion of the statute involving evil intent, i.e., criminal negligence, then the applicant may be found to have committed a CIMT.

As emphasized by the decision of the interim district director, the applicant was "requested by letter dated September 23, 2002 to provide the 'police arrest report', which has not been received as of this date." *See* Decision of the Interim District Director at 2. Since the applicant has not demonstrated that his crime lacked evil intent, the AAO upholds the finding of the interim district director that the applicant was convicted of a CIMT.

A section 212(h) waiver of the bar to admission resulting from section 212(a)(2)(A) of the Act is dependent first upon a showing that the bar imposes an extreme hardship to the citizen or lawfully resident spouse, child or parent of the applicant. Any hardship suffered by the applicant himself is irrelevant to waiver proceedings under section 212(h) of the Act. Once extreme hardship is established, it is but one favorable factor to be considered in the determination of whether the Secretary should exercise discretion. *See Matter of Mendez,* 21 I&N Dec. 296 (BIA 1996).

Matter of Cervantes-Gonzalez, 22 I&N Dec. 560, 565-566 (BIA 1999) provides a list of factors the Board of Immigration Appeals deems relevant in determining whether an alien has established extreme hardship pursuant to section 212(i) of the Act. These factors include the presence of a lawful permanent resident or United States citizen spouse or parent in this country; the qualifying relative's family ties outside the United States; the conditions in the country or countries to which the qualifying relative would relocate and the extent of the qualifying relative's ties in such countries; the financial impact of departure from this country; and significant conditions of health, particularly when tied to an unavailability of suitable medical care in the country to which the qualifying relative would relocate.

Counsel submits a statement from the applicant to support the assertion that the applicant's spouse and child would suffer extreme hardship if the applicant were denied a waiver of inadmissibility to the United States. *See* Declaration of Claro Pacheco-Fernandez, dated December 1, 2002. The applicant indicates that he solely supports his wife and child and that the insurance offered through his employment provides medical care for his wife, who suffers from high blood pressure and diabetes, and son. *Id.* The record does not demonstrate

that the applicant's spouse is unemployed or unable to obtain employment in order to provide financially, including medical coverage, for herself and the couple's son. The assertions of the applicant are made without substantiation by the record and standing alone do not support a finding of extreme hardship.

U.S. court decisions have repeatedly held that the common results of deportation or exclusion are insufficient to prove extreme hardship. *See Hassan v. INS,* 927 F.2d 465, 468 (9th Cir. 1991). For example, in *Matter of Pilch,* 21 I&N Dec. 627 (BIA 1996), the BIA held that emotional hardship caused by severing family and community ties is a common result of deportation and does not constitute extreme hardship. In *Perez v. INS,* 96 F.3d 390 (9th Cir. 1996), the Ninth Circuit Court of Appeals defined "extreme hardship" as hardship that was unusual or beyond that which would normally be expected upon deportation. The Ninth Circuit emphasized that the common results of deportation are insufficient to prove extreme hardship. Moreover, the U.S. Supreme Court held in *INS v. Jong Ha Wang,* 450 U.S. 139 (1981), that the mere showing of economic detriment to qualifying family members is insufficient to warrant a finding of extreme hardship. The AAO recognizes that the applicant's wife and son will endure hardship as a result of separation from the applicant. However, their situation, based on the record, is typical to individuals separated as a result of deportation or exclusion and does not rise to the level of extreme hardship.

A review of the documentation in the record fails to establish the existence of extreme hardship to the applicant's spouse and child caused by the applicant's inadmissibility to the United States. Having found the applicant statutorily ineligible for relief, no purpose would be served in discussing whether he merits a waiver as a matter of discretion.

In proceedings for application for waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of proving eligibility remains entirely with the applicant. *See* Section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.